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Analysis

EdinLR Vol 15 pp 423-427

Tackling Sectarianism Through the Criminal Law

The Scottish Government is (at the time of writing) piloting through the Scottish Parliament the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. Its target is in effect sectarianism. Whatever form any new statute will take, the burden will remain with the justice system to decide what sectarianism is. That task will of course fall on the overworked fiscals and the lower courts. Given the recent decision by Sheriff Scott regarding a prosecution which linked an anti-Israel protest with racism, where he described the Crown's attempt "to squeeze malice and ill-will out of the agreed facts" as "rather strained",¹ Crown Office will surely find this unwelcome.

The higher criminal courts stubbornly buck responsibility for defining either religious or racial prejudice. In *Walls v Brown*, Lord Carloway observed only that there could not be "any reasonable comparison" between the Famine Song, God Save the Queen and Flower of Scotland because the Famine Song "call[s] upon people native to Scotland to leave the country because of their racial origins".² In *Dyer v Hutchison* the offender directed anti-English abuse against Rangers supporters. It was decided that his conduct "may not have been racist in the same way" as that of the two other appellants, who made monkey grunts and yelled "you dirty black bastard".³ It is understandable in such an embattled and politicised area of law that both drafters and judges have been tempted to provide as little definition as they humanly can. On the other hand, the Scottish appeal courts have rather taken the biscuit.

What would adequately define Scottish sectarianism? Academics agree on one thing: it is not predominantly "about religion". Arguments then begin about what else it is a proxy for (racism; tribalism; the hidden injuries of class) and how deep it runs (history; life chances; demography). What women contribute, research has not noticed. Perhaps, some say, it might be deemed ethno-religious. But, however plausible that might be as regards some "Protestant" offenders, can we really foist an

1 *Procurator Fiscal (Edinburgh) v Napier and others*, Edinburgh Sheriff Court, Sheriff's Note issued 8 Apr 2010. See "Israel protest at concert 'was not racist'", *BBC News Online* 8 Apr 2010.

2 *Walls v Brown* [2009] HCJAC 59, 2009 JC 375 at para 19.

3 *Dyer v Hutchison* [2006] HCJAC 45, 2006 JC 212 at paras 27, 5 and 8.

ethno-religious motivation on “Catholic” offenders? Whatever, what no-one predicted is this spring’s brutal outbreak of sectarian lawlessness related to football.

A. SECTARIANISM IN MODERN SCOTLAND

It will not help that football chanting has its own unique and subtle symbols and does not depend exclusively on crude abuse. The courts do not often find themselves bamboozled by racist thugs wandering through Pollokshields singing a menacing chant worded, say, “I love being Scottish”. But in football, laudatory songs – “up the IRA” – are common and must in principle be distinguished from express prejudice – “up yours, you Fenian bastards”.

The underlying problem for the law, however, is that Scottish sectarianism is not a unitary phenomenon. Unlike Northern Ireland, Scotland has pockets of football rivalry where supporters sing and yell sectarian insults, knowing that these are damaging and are banned, but barely grasping the cultural differences from which these originate.⁴ Perhaps the best example of the difference between the two nations is the recent attempt at a legislative definition of sectarian in Northern Ireland. The definition of sectarian chanting proposed by the NI Human Rights Commission, and accepted by the NI Executive, was that “it consists of or includes matter which is threatening, abusive or insulting to a person by reason of that person’s religious belief or *political opinion* or against an individual as a member of such a group”.⁵ The definition had cross-party support and failed to become law only because it was opposed by the Ulster Unionist Party.

It is hard to imagine a Scotland today where sectarian belief could be demarcated by political loyalty. Indeed religious prejudice, it seems, was not read across to include political taunts in one case where football supporters sang songs about the IRA – even though a religious aggravation in Scots law can extend even to an offence motivated by malice and ill-will “against a social or cultural group with a perceived religious affiliation, based on their membership of that group”.⁶ Reference to a political organisation, whatever its meaning in the Northern Irish context, could not by itself be seen in Scotland to amount to religious prejudice.

Protestant and Catholic Scotland, as Michael Rosie explained in what remains the best recent work on the topic,⁷ is a society marked by bigotry but not systematic discrimination; by clashing identities but not by separate worlds; and by spats but not warfare.⁸ People do not vote for Catholicised and Protestantised political parties.

4 See e.g. C and R Deuchar, “Territorialities in Scotland: perceptions of young people in Glasgow” (2009) 12 *Journal of Youth Studies* 731 at 740.

5 Northern Ireland Assembly, Official Report, amendment 9, tabled 3 Mar 2011 (emphasis added).

6 Criminal Justice (Scotland) Act 2003 s 74. See also “Sheriff right to dismiss case against man singing IRA songs, says expert”, *Scotsman* 30 Mar 2011.

7 M Rosie, *The Sectarian Myth in Scotland* (2004).

8 Compare Northern Ireland: House of Commons Northern Ireland Affairs Committee, *The Challenge of Diversity: Hate Crime in Northern Ireland, Ninth Report of Session 2004-05* (HL 2004-05, 548-I) vol I para 13.

Roman Catholics in Scotland today have an even chance of settling down with someone outside their own religion.⁹ As an audience member at a recent Edinburgh University evening debate asked, why are we treating football as the symptom and not the disease?

What is notable about the recent horrific history of assaults and bullets and bombs by post is that it is so atypical. The most vulnerable victims in Scotland are the visible ethnic minorities, who continue to live in greater poverty, with all the disadvantage that entails, and whose experience of criminal victimisation miserably overshadows the anti-Catholic experience. Charges with a racial aggravation amount to over 4000 a year, with the great majority of victims identified as coming from the tiny proportion of these groups in Scottish society.¹⁰ Interviews in 2004 with 175 people who had reported racist incidents in the Strathclyde region found that more than a third described enduring such incidents so frequently, even constantly, that they could not quantify the number involved. The majority experienced this abuse from different perpetrators, rather than repeat victimisation from a single source.¹¹

Rosie and other social theorists have had insufficient to say, though, about the justified apprehension felt by a person who fears they may be identified with the Roman Catholic minority. There were 693 charges with a religious aggravation in the most recent annual figures released,¹² and it is unlikely to be a mere artifice of reporting and recording practices that the chances of “Roman Catholicism” being the target were (on the last occasion that the count was made public) around twice that of “Protestantism”.¹³ Meanwhile, much of the public debate about separate education seems unable to refrain from openly hostile victim-blaming based on no credible evidence.

The problem is not confined to football. There is anti-Catholicism and anti-Irish feeling in Scotland, albeit that we struggle even to estimate its prevalence. In particular it is wrong to imply by omission that the hostility is the same on both sides. Chants of “Prod” or “Hun” and a few breach of the peace convictions do not amount to equivalence. Scots law, however, could not successfully distinguish the two phenomena without incurring huge criticism: recognising the differences would thus inevitably be left to the fiscals and the courts.

9 Currently the best source is C Holligan and G Raab, *Inter-Sectarian Couples in the 2001 Census* (Scottish Longitudinal Study Research Working Paper 7, 2010) para 12. Note this is less “inter” mixing than a random assortment would create, a point most commentators omit to mention.

10 Scottish Government, *Statistical Bulletin: Racist Incidents Recorded by the Police in Scotland, 2009-10* (2011) table 8. 2% of the population in the last census identified as “other white” and 2.5% placed themselves in the remaining minority categories: see Office of the Chief Statistician, *Analysis of Ethnicity in the 2001 Census – Summary Report* (2004). The proportion will have grown since.

11 K Goodall, R Choudri, R Barbour and S Hilton, *The Policing of Racist Incidents in Strathclyde* (2004) 10.

12 Crown Office and Procurator Fiscal Service, “Hate crime in Scotland 2010-11” (nd), available at [http://www.copfs.gov.uk/sites/default/files/Hate Crime-publication-final version.pdf](http://www.copfs.gov.uk/sites/default/files/Hate%20Crime-publication-final%20version.pdf).

13 K Doyle, *Use of Section 74 of the Criminal Justice (Scotland) Act 2003 – Religiously Aggravated Reported Crime: An 18 Month Review* (2006) para 3.2.

B. A CRIMINAL SOLUTION?

So it is in the midst of all this that the SNP government introduced its new Bill. As weary practitioners and law lecturers revising their notes will be asking, is it necessary? Would it work?

The Bill, it seems, sets out largely to mortar cracks and create nominate offences.¹⁴ The cracks are few and there is (for the most part) ample law to cover disorderly or threatening behaviour. Explicit naming of football offences appeals to many, though, and a true gap exists in the arena of incitement to religious hatred, because it is an insult to victims to subsume this under religiously aggravated breach of the peace. Defining these is a delicate job to take on. The Bill as introduced was far too flawed in either concept or construction to be fit for it. Much amending will be needed, but this could be done.

The other question however is whether new provisions will work. It has long been argued by criminologists that longer sentences do not deter crime and that policymakers do not want to know this.¹⁵ Governments, however, must be seen to be responsive, and there are benefits to be gained from instantiating longer sentence maxima and creating new, named offences. Each time sentence enhancement provisions have been introduced in the UK, they have been marketed, sometimes primarily, as messages sent to the general public and the victims: an expressivist approach. They are sold, too, as a means of bringing about changed behaviours. One important function they also carry out is to measure and monitor offences where an aggravation has been proven. It is easily forgotten that before the introduction of police monitoring of racist incidents in Scotland, commentators were fond of announcing that Scots were too busy being sectarian to engage in something as un-Scottish as racism.¹⁶ Records of convictions which include statutory aggravations provide further evidence not just that racially aggravated behaviour is alleged, but that it has occurred.

Nonetheless, more new legislation seems at first sight an expensive and bureaucratic way to prove there is a problem. The question therefore is whether a denunciatory message has value and whether new legislation might change these presumed sectarian behaviours. Again, orthodoxy claims not, but Phyllis Gerstenfeld has cited behavioural studies research which concludes that law can influence people to reduce overt prejudice, and that it is possible - indeed such an approach is relatively effective - to change attitudes through changing their behaviour.¹⁷

The old chestnut that the solution is education, education, education need not be wholly rejected, but Gerstenfeld elsewhere suggests that when a "hate" crime is carried out in search of a thrill, to gain excitement and social capital, a policy of tackling bigotry in society may not be all that productive.¹⁸ Notably, of the

¹⁴ See para 11 of the Explanatory Notes to the Bill.

¹⁵ See especially the special issue (10(1), February 2011) of *Criminology and Public Policy*.

¹⁶ See e.g. P Dimeo and G Finn, "Scottish Racism, Scottish Identities", in P Brown (ed), *Fanatics! Power, Identity, and Fandom in Football* (1998).

¹⁷ P B Gerstenfeld, *Hate Crimes: Causes, Controls, and Controversies*, 2nd edn (2011) 209.

¹⁸ *Ibid* 279.

cases examined in Doyle's review of the operation of section 74, 95% of the convictions were for breach of the peace. Over half were specifically recorded as involving alcohol. In 34% of the cases the target was the police, and in 45% the target was the community, suggesting disorderly conduct. Only 17% of targets were "civilians" (neither police officers nor workers in the leisure industry, transport or hospitals).¹⁹

Furthermore, it seems that the public may be more likely to hold favourable views of the criminal justice system when they are more informed about patterns of sentencing.²⁰ Even just a public discussion which provides more information about sentencing may prove useful. It matters that the public feel positive toward the criminal justice system; not least because it is they who report crimes and support the prosecution process throughout.²¹ All in all, the evidence is far from conclusive, but we should give new measures a considered hearing.

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The Carloway Review: An Opportunity Lost

The decision of the UK Supreme Court in *Cadder v HM Advocate*¹ shook the Scottish legal establishment with its declaration that Scots law failed to provide full and fair protections for persons held in police custody. Reactions to *Cadder* vary from an acceptance that it unmasked a serious fallibility in Scottish procedural practice,² to a belief that it was an ill-informed rejection of Scotland's intricate net of safeguards that had hitherto been thought sufficient to satisfy the demands of article 6 of the ECHR.³

Following *Cadder*, the Justice Secretary, Kenny MacAskill, appointed Lord Carloway to undertake a review of the law and practice of detaining and questioning suspects in a criminal investigation in Scotland.⁴ There have been many appeals

19 Doyle, *Religiously Aggravated Crime* (n 13) para 3.16.

20 J M Gay, "What shapes public opinion of the CJS?" in J Woods and T Gannon (eds), *Public Opinion and Criminal Justice* (2009) 49 at 65;

21 G Tendayi Viki and Gerd Bohner, "Achieving accurate assessment of the attitudes toward the CJS: methodological issues", in Woods and Gannon (eds), *Public Opinion* (n 20) 96.

1 [2010] UKSC 43, 2010 SLT 1125.

2 J Scott, "Detention without access to a lawyer ends in Scotland", *The Guardian*, 27 Oct 2010, available at <http://www.guardian.co.uk/law/2010/oct/27/detention-without-access-lawyer-scotland-ends>

3 J McCluskey, "Supreme error" (2011) 15 EdinLR 276

4 See Carloway Review, *Consultation Document* (2011), available at <http://www.scotland.gov.uk/About/CarlowayReview>.

involving Scottish rules of evidence and procedure since devolution and the enactment of the Human Rights Act in 1998. What sets *Cadder* apart are the wider repercussions of the specific finding in the Supreme Court's conclusion that a detained person in police custody is entitled to legal advice before facing an interview. The previous arrangement whereby such persons only had the right to have a solicitor notified of their detention, with the right to a consultation with a solicitor deferred until arrest, was deemed in *Cadder* to be a contravention of article 6.

This short paper provides an overview of the remit of the Carloway Review (henceforth the Review) and some suggestions about the future implications of its deliberations. Although one focus of the Review is to examine whether the emergency legislation requires amendment, it is accepted that *Cadder* raises far more issues than the point at which entitlement to legal advice arises. The more complex challenge for the Review lies in its response to these broader issues since they strike directly at long-standing assumptions about the Scottish fair trial.

The Supreme Court insisted that *Salduz v Turkey*⁵ had effectively established a new rule. The justices were unmoved by the reasoning in the full bench decision in *HM Advocate v McLean*⁶ that overall Scots law met the requirements for a fair trial. The result was not only that Scotland's arrangements for questioning suspects and detainees were ruled out of step with article 6(3)(c), but that these deficiencies could not be assuaged by the existence of other procedural safeguards. The decision therefore generates a whole host of questions beyond the immediate one concerning that appeal. The so-called "Sons of *Cadder*" cases due to be adjudicated by the Supreme Court later this year may resolve some of these questions, but they may also throw up further criticisms of Scots law and for that reason the Review cannot avoid an expansive and flexible remit.

A. THE CONSULTATION

In his foreword to the Review's consultation document, Lord Carloway seizes this opportunity to re-visit the whole framework of safeguards that underpin the fair trial:⁷

I am keen that this Review should be more than an attempt merely to adjust or tweak any perceived flaws in the legislation. It should take the opportunity to re-examine the core principles underlying the procedures of detention, police questioning, charge and arrest, and the implications for concepts such as corroboration and the inference from silence. This will then inform recommendations for changes to the criminal justice system that will enhance its operation as a whole, in a way that properly and fully meets the requirement to protect the rights of victims and suspects.

⁵ (2009) 49 EHRR 421.

⁶ [2009] HCJAC 97, 2010 SLT 73.

⁷ Carloway Review, *Consultation Document* (n 4) 3. "The legislation" is the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, the emergency legislation enacted in the aftermath of the *Cadder* judgment.

This is a bold and ambitious agenda. While the sentiment is admirable there must be real doubts about whether it can be achieved. The Review timetable permitted a consultation period of eight weeks. It is difficult to see how complex matters such as “the implications for concepts such as corroboration and the inference from silence” can be fully explored in the proposed condensed schedule. Although Lord Carloway has held a number of open Roadshows, the reality of such a tight timespan is that attendance is from a relatively small set of professional groups with the freedom and motivation to engage. Broader public debate is necessarily limited and much reflective argument vital to the law reform process may never emerge or only be aired at the legislative stage.⁸

The Review groups its enquiry around three main components: custody, evidence and appeals. It poses far-reaching questions for a post-*Cadder* environment, most of which can be loosely characterised as “does this existing rule or practice continue to serve a useful purpose”? For example, the Review invites readers to reflect upon such diverse and consequential possibilities as whether the exclusionary rules should be in statutory form, whether the corroboration rule should be abolished, whether there is still a need for the police charge, or for retaining a distinction between detention and arrest, and whether police questioning should be permitted at any point between charge and trial.⁹

One obvious concern must be how far the debates and arguments generated by the Review foreshadow a new dawn. *Cadder*’s impact has been described by Lord Carloway as one that “overturned Scottish jurisprudence”.¹⁰ One cannot create a new jurisprudence overnight nor should one try to do so. The challenge is to construct a comprehensive and coherent response that absorbs the upheaval. That in turn requires time for a full and reflective consideration of the whole body of rules of evidence and procedure. If a piecemeal approach to reform is followed, there is a real danger of caveats, exceptions and unforeseen complications emerging, with the likelihood of the whole issue having to be re-visited in the next few years.

As an exercise in how to conduct law reform, the Review is far from ideal. For example, take the treatment of corroboration, a rule which is also currently subject to scrutiny by the Scottish Law Commission, the body officially charged with law reform, in their current project on similar fact evidence and the *Moorov* doctrine. Their recommendations on corroboration will need careful integration with those of Lord Carloway. In regard to corroboration the terms of reference for the Review require it to:¹¹

...consider the criminal law of evidence, insofar as there are implications arising from [legal advice prior to and during police questioning] in particular the requirement for corroboration and the suspect’s right to silence.

⁸ Lord Carloway’s remit is “to prepare recommendations for legislative change and new guidance”: Carloway Review, *Consultation Document* (n 4) para 1.

⁹ *Ibid* 35.

¹⁰ *Ibid* 3.

¹¹ *Ibid* 9.

These last two requirements are addressed by the Review as:¹²

Sufficiency of evidence (including corroboration) covering the thresholds of evidence required for charge, prosecution, determination of “no case to answer” and conviction [and o]ther “safeguards” for a fair trial, such as a prohibition on inferences drawn from a suspect’s silence at interview.

The Review notes that “it wishes to examine the practical value of these evidential rules in and of themselves” and not consider them “solely or even primarily in terms of “re-balancing” the system”.¹³ Nonetheless, a re-balancing may be precisely what some politicians and policy-makers have in mind. The effect of *Cadder* is to close off one major opportunity for the police to gather evidence from suspects. Police investigations are inevitably impeded to some extent. The consequent focus on corroboration and adverse inferences cannot fail but to give the impression of a *quid pro quo*. Lord Carloway is frank about the import of all this: “[t]he proposition is simply that Scots law is out of date and out of kilter with all European and common law systems”.¹⁴

B. ANALYSIS

There can be no doubt that what is contemplated in this Review is the possibility of the dilution or even abolition of the rule of corroboration. This is a debate that has been in the wings for some years, though largely confined to sexual offences and other cases where corroboration is notoriously hard to find. The abolition of corroboration has been advanced by a range of senior figures within the criminal justice system including the current and most recent Lord Advocate and ACPOS representatives.¹⁵ However, to abolish corroboration in rape cases needs a sound theoretical basis to avoid the criticism that it is an expedient to deal with embarrassingly high attrition rates. Arguably, removing the corroboration rule simply diverts attention away from tackling other potentially more effective responses to the structural problems associated with rape prosecutions. It could even be counter-productive by placing greater scrutiny on a complainer’s credibility and reliability. None of these arguments are raised in the Review.

Lord Carloway acknowledges corroboration is a tenet of “cornerstone” status in the criminal justice system. If he recommends its removal in all or some cases, that will constitute an astonishingly radical proposal. For many people corroboration is an article of faith to be defended at all costs. Others may adopt a more pragmatic attitude. Nonetheless, corroboration is central to the body of rules of evidence. The potential harm to the integrity of the whole if there is reform of selected individual rules lies as much in a perception that insufficient time has been devoted

¹² Ibid 10-11.

¹³ Para 3.

¹⁴ Para 12.

¹⁵ G Rose, “Police leader attacks evidence controls”, *The Scotsman* 29 Jun 2010.

to public debate of the consequences of abolition as in the substance of the eventual recommendations.

From another perspective there is the interesting question of whether abolishing corroboration will make any practical difference. Proponents of that position argue that it will neither change the rule on sufficiency of evidence nor the prosecutor's obligation to prove the case beyond reasonable doubt. Prosecutors will still require sufficient evidence to prosecute, and courts will still require sufficient evidence to convict. Roberts and Zuckerman, leading English commentators, have observed:¹⁶

Abolishing the law of corroboration no more dispenses with epistemic standards for assessing evidence support than abolishing the law of hearsay would cure the inherent infirmities of second-hand evidence.

If Roberts and Zuckerman are right, changes to corroboration or adverse inferences may not effect the re-balancing some desire and others fear. Even if it appears to ease the path to sufficiency, it can be predicted it will also create new contested areas concerning admissibility. For example, if legal advice is given at an earlier stage in detention then the fairness of the admissibility of a suspect's answers will have to be judged in light of the fairness of the quality of information supplied by the police to the solicitor. If police questioning is permitted after arrest then different arguments over the fairness of evidence derived at that stage will arise. Claims of defective representation may take on a new dimension—with convicted clients complaining their solicitor made strategic errors and gave flawed advice as to the level of co-operation that a client should offer. Depending upon how any permitted waiver of rights to legal advice is formulated, the assessment of whether a vulnerable suspect was in fact capable of such a decision may be contested at a later stage.

New legislation can change the existing law but legal culture and practice is often much slower to respond, especially where there has been trenchant resistance to the changes and where there is substantial discretion in how the changes can be interpreted.¹⁷ It will be impossible for Lord Carloway's recommendations to satisfy all sides of the debate given the polarised nature of the arguments. The consultation period has at times been overshadowed by rather ill-tempered arguments about the constitutional role of the UK Supreme Court in regard to Scots criminal law. That, along with the curtailed scope of the substance of the consultation, denies Scotland the much wider examination of procedural and evidential rules that a modern criminal justice system deserves. Until such an exercise is undertaken, Scottish law and practice will inevitably face further Convention challenges.

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16 P Roberts and A Zuckerman, *Criminal Evidence*, 2nd edn (2010) 663.

17 A. Karmen, *Crime Victims: An Introduction to Victimology*, 2nd edn (1990).

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Much Ado About Justice

A. GARDE À VUE

In France, as elsewhere, a person suspected of an act that may incriminate him penally may be held by the police and interrogated, before actually being prosecuted. We describe this situation as *garde à vue*, and the duration, conditions and mode of supervision are among one of the most sensitive issues for human rights in a modern democracy. All the more at a time when the French public discovered that the practice was far more frequent than had been realized. In fact the media have begun to relay the experiences of would be offenders from a middle class who had never imagined having to remove shoes or even a brassiere to conform to the rules in such a situation. Some 800,000 people seem to have been held in such fashion. This is to be explained in two manners: the increasing severity of the penal code itself, which has multiplied the situations eventually leading to a prison sentence, now *garde à vue* may only be prescribed if there is such an eventuality; and the second even more effective cause is the generalised clampdown on traffic offences.

The government's plan to review the entire code of criminal procedure did not necessarily include this preliminary stage of *garde à vue*. But the proposals met with an unexpected interest from the public and set a series of political dilemmas for their authors.

The Minister of Justice believed the only issue was to update rules which had at any rate been strengthened during the last decade. Conditions for *garde à vue* were set as follows. The power to place a person in *garde à vue* was the responsibility of the police, but specifically was to be exercised by an *officier de police judiciaire*. This means a special entitlement delivered to some officers under the control of the judiciary.

There could fall under such powers any person susceptible to give information on the facts eventually leading to an incrimination or on the objects or documents related to such a case. There could then be retained, for a period not exceeding twenty four hours, a person against whom there might be plausible reasons to suspect they have committed an offence. The *Procureur de la République*, who is a magistrate from the *Parquet*, is immediately notified. The police may then keep a person in custody for another twenty four hours, but must be authorised to do so by the *Procureur*. At the end of this period, the person is either released without charge, or officially charged by the *Parquet*, and the prosecution then follows the set rule in front of the judiciary.

Conditions for *garde à vue* allow for some precautions. The person is immediately informed of the charges, and is eventually allowed an interpreter. He or she may ask for the presence of a lawyer who is allowed thirty minutes in presence of the detainee, but has no access to the file or documents and may not assist in interrogation. The same is true in the case of prolongation. However this very short delay, twenty four hours, does not apply to a series of grave incriminations, where counsel may not be admitted before forty eight or even seventy two hours.

B. REFORM

There has always been an underlying controversy about these conditions, and the delicate balance required between the necessities of the investigation and the rights of the person. But for the government, in other matters so intent on reform, there was no urgency here. At least, there would have been no cause for concern, if there had not been a form of mobilisation of the European Court of Human Rights on the subject. Not that the French government had at the time been censored specifically, but some decisions had come rather close. In particular, the Court had ruled that interrogation carried out in the absence of counsel and without his assistance should not be held valid as proof.¹

This fuelled a rising disquiet in the legal profession about the very strict constriction of the role of counsel in these situations. When this running complaint from the lawyers – dissatisfied with the need to be present when called at any time of day or night, with the impossibility of providing much more than moral support – met with public disquiet about the frequency of *garde à vue*, the whole proposal was turned on its head and the minister had to contemplate some more liberal adjustment than had been at anytime envisaged.

The argument in favor of a radical, and more liberal change in legislation are well summed up in an opinion made public before the summer by our National Advisory Commission on Human Rights. For this body, there was much cause for concern in the existing situation and in the perspectives tabled for its reform. The difficulty starts from the fact that *garde à vue* was initially promoted as a legal framework for some necessary forms of preliminary detention. It is to be preferred to any informal system by which the police call a person for interrogation without any set conditions. And so we can immediately note that human rights champions are up in arms against the suggestion that a person could voluntarily accept being held for interrogation without the rules of *garde à vue* being enforced.

Everybody accepts there has to be a legal regime. But should it become systematic? Should it become a form of physical punishment? Should it leave the person alone and practically undefended in the face of his interrogators?

The Commission severely criticized the ever extending practice of *garde à vue*. This was due to criteria that were originally too imprecise, or when related to the nature of a possible incrimination, were bound to follow the tendency to multiply situations involving penal incrimination and particularly those opening up the eventuality of a prison sentence. All the proposals for a better definition came to rely on the police officer's ability to qualify the suspected acts as a penal matter. So the first complaint related to qualification of the situations requiring *garde à vue*. The system fell short when it came to the assistance of a lawyer. Here the European Court of Human Rights is adamant: according to article 6, assistance must be provided from the moment a person is detained and the incriminating elements may not be compiled without the active presence of a lawyer.²

1 *Salduz v Turkey* (2009) 49 EHRR 19.

2 App No 7377/03 *Dayanan v Turkey*, 13 Oct 2009; App No 5472900 *Adamkiewicz v Poland*, 2 Mar 2010.

We moved into a ponderous programme of consultations. Of course few bodies consulted, except the police, wanted to come forward as supporters of *garde à vue*. And the lawyers' organisations realized the time had come for a full bodied pressure to increase the presence and especially the function of counsel during *garde à vue*. So far nobody quite knows what the government would have made of the situation unwillingly created by the proposed reform.

C. CHALLENGE

Then all of a sudden, we came up with one of these legal happenings which can make history. Our country has recently revised its constitution and provided for the first time a form of judicial control of the conformity of existing law to the constitution. This works through a question set before the Constitutional Council by one of the high courts, the *Cour de Cassation* or *Conseil d'Etat*, when having to apply the law to a given case. There have been so far very few cases, but many lawyers dealing with criminal cases were waiting in ambush to question the existing legal status of *garde à vue*. And so the Constitutional Council has given its answer, in one of the very first decisions using its powers to control existing law, on 30 July 2010.

The existing legislation was challenged on several grounds. First, reference was made to the constitutional principle that the judiciary is the guardian of individual freedom. This could mean that the police were acting outside their jurisdiction when enforcing a measure implying detention. This argument went on to say that the *Procureur*, called upon to control the reasons for detention, was not a fully fledged member of the judiciary, and that in any case he could not exercise proper control without actually seeing the person.

Beyond this, the argument continued, the constraints involved in *garde à vue* by far exceeded what could be reasonably required for the needs of the investigation. Thirdly, the material conditions of detention in this way were not compatible with human dignity. Finally, the suspect's rights were not properly taken into account, in that there was no requirement to remind him of his right to silence, and that the lawyer's assistance as provided was but a sham, delivered under unequal circumstances.

Before answering, the Council had to define its method, and in particular whether or not it would be held by precedent in what was a completely new scope for its supervision of the law as decided in Parliament. Criminal procedure is not a new field of law, and in particular the above mentioned rules for *garde à vue* had come under the scrutiny of the Council in the recent years, as the Council had been called upon to examine preventively the constitutionality of new laws reforming or adjusting the system. The new procedure, allowing the Council to review existing law, could not ignore the previous decisions which could, in its preventive role, have validated the criticized prescriptions. And so the Council ruled as a preliminary stand for its future decisions. But the Council went on to allow that this could not apply if there had been a notable change in circumstances. And here we read, not without surprise and some admiration, that such a change in circumstances is acknowledged by the Council.

Yes, the conditions for *garde à vue* had been declared valid in 1993. Yes, since then guarantees had even been reinforced. But some recent changes in the general regime of criminal procedure and particularly in the practice of the authorities had led to a much more frequent use of these powers and upset the delicate balance between obligations and rights.

And there, what had previously been considered rather condescendingly as the thesis of the naïve do-gooders suddenly attained the status of constitutional law. The Council took into account the fact that more and more people are incriminated without a criminal procedure *stricto sensu* being opened, and on the basis of the facts reported to the *procureur* by the police in the course of *garde à vue*. *Garde à vue* had become the preferred way to draw up a case.

The Council goes on to note, diplomatically but rather unkindly, that an *officier de police judiciaire* is not the qualified officer that he used to be. Because of the necessities of overwork, the capacity to ordain *garde à vue* has widened to include the more lowly members of the police forces, and the number of those entitled had more than doubled since the Council's 1993 decision.

Garde à vue had become common practice, concerning 790,000 persons in 2009. It was time to reopen the discussion. And the constitutional judge went on to do so, in the characteristic balancing tone with which French commentators are familiar. The Council proceeds first to do away with the argument based on human dignity: it has not been the legislator's remit to provide for the material conditions of *garde à vue*, and the law may not come under criticism because of the way it is applied by the administration.

But we now come to the core of the matter. The law must reconcile the necessity of preventing criminal activities and identifying perpetrators of such acts and the enjoyment of the liberties inscribed in the Constitution, among which are individual freedom as protected by the judiciary and the right to be properly defended. *Garde à vue* is not unconstitutional as such, on the contrary it is a necessity, but it must be accompanied by the appropriate guarantees.

Guarantees were deemed sufficient so far as the intervention of the judiciary was provided for at an early stage in the procedure. To come to this conclusion, the *Conseil* had to anticipate on a very serious matter which will crop up again about the other proposed reforms. It stated that the magistrates sitting in court and the magistrates charged with the prosecution were both part of the judiciary. This meant that the control of the prosecuting magistrate during the first 24 or 48 hours, if properly exercised by an authority who could always require to see the detainee, was acceptable. And the responsibility would automatically pass on to a fully fledged magistrate after the expiration of these very short delays.

However, the *Conseil* was not happy with the situation during the *garde à vue*. The person held can be interrogated without counsel's support, whatever the circumstances of the case, without consideration of any particular problems relating to the conservation of proof or the protection of third parties. The person is not even alerted to the fact that he is entitled to remain silent.

And so the *Conseil* concluded that taking into account the change in perspective the procedure had become unbalanced and no longer conformed to the constitution.

A few weeks later, the Constitutional Council confirmed it really meant business. In another case involving the traditional powers of retention used by the custom authorities, an age long practice based in law, the Council ruled that the impossibility for the detained person to access immediately legal help was contrary to his constitutional rights.

There will be much rejoicing in human rights circles. But for the persons actually detained or susceptible to be so, they will come to understand a victory in constitutional matters is not like winning your case in any ordinary court. The *Conseil* stepping carefully in the field of these new powers has shown itself to be very creative. The decision concludes that it is not up to the *Conseil* to provide the properly balanced statutory draft that will conform to its ruling, but for parliament. And it quietly decides that the public authorities shall need a year to sort out the matter and come up with a proper reform, meanwhile the unconstitutionality of existing law on *garde à vue* shall be of no effect on individual cases.

We now in France hold our breath, as the message from the executive has radically changed. Our minister of justice is caught between the pincers of the Constitutional Council and the European Court of Human Rights. The government's goal is now to radically reduce, hopefully halve, the number of persons held in *garde à vue*. A new draft comes up with a much more precise definition of the situations allowing this form of detention, new openings for defence. Counsel for the defence may be present at the start of the interrogation and access the documents drawn up by the police. The defendant will be reminded he is under no obligation to answer, and a written summing-up by the lawyer will accompany the proceedings. A number of practical precautions are provided for, to ensure the dignity of the person detained. Will this satisfy the constitutional requirements? In spite of all these manifestations of goodwill, the proposals, at their present stage, still reveal a number of astute ways of slipping out of the new constraints. One is to proclaim that a person may voluntarily accept interrogation, and none of the new rules may then apply. Another is to proclaim none of these precautions apply to the exceptional prolonged situations of *garde à vue* provided for in the serious incriminations of terrorism and such matters. And here and there, loopholes are provided for the administration to refuse, for some superior reason, and under the supervision of the Parquet, the new guarantees provided for by the law.

Just as I was concluding my story, only a day ago, our *Cour de Cassation* has now joined the chase: it has ruled that proper implementation of article 6 of the Convention requires complete assistance from counsel, even in those situations where exceptional reasons allow for prolonged detention. This means the proposed draft under discussion must again be amended.

Nicole Questiaux

(This text is an excerpt from a memorial lecture given for Joëlle Godard – “Much Ado About Justice: Reforming Criminal Procedure in France” – at the University of Edinburgh on the 22nd October 2010. It has been editorially prepared by the Review, which bears full responsibility for any errors or omissions.)

EdinLR Vol 15 pp 437-442

Slander of Property: *Continental Tyre Group Ltd v Robertson*

In 1898, the last proper slander of property case, *Bruce v JM Smith*,¹ was decided in Scotland.² Since then, in cases where a potential slander of property issue has arisen, the action has been brought and decided, at least partially, through the law of defamation. *Continental Tyre Group Ltd v Robertson*,³ and the subsequent appeal to Sheriff Principal Bowen,⁴ presented an opportunity to depart from this general trend and to resurrect the viability of the more appropriate cause of action – slander of property.

A. THE FACTS AND FIRST INSTANCE DECISION

Continental Tyre Group Limited, the pursuer, is a seller and distributor of motor car tyres manufactured by Continental Group. The defender, Alan Robertson, owns a tyre and exhaust business in Linlithgow. It was alleged that the defender had made numerous defamatory comments relating to the “barum” tyre which is sold and distributed by the pursuer. One remark in particular, alleged to have been made in September 2009, was founded upon by the pursuer. The thrust of this statement was that the barum tyre was unsafe and that the defender “would not put them on his worst enemy’s car”. The pursuer sought interdict to prevent the defender from making further false and defamatory statements.

At first instance Sheriff Kinloch held that the statements averred were defamatory, but that the remedy craved was too wide to be given effect. The sheriff, in reaching “an unusual result”, rejected the first three submissions advanced by the defender.⁵ In rejecting the first submission Sheriff Kinloch adopted a contextual approach. By reference to the defender’s own averments, which contained a general denial that he had questioned the safety of the barum tyre, the Sheriff concluded that in such circumstances there was no question of qualified privilege being applicable.⁶ It therefore followed that submission two, prefaced as it was on the acceptance that the case gave rise to qualified privilege (submission one), was also to be rejected: malice need only be pled where the case engages qualified privilege or verbal injury.⁷ The third submission by the defender, that the action was fundamentally deficient due

1 (1898) 1 F 327.

2 This point is noted in E Reid, *Personality, Confidentiality and Privacy in Scots Law* (2010) 106.

3 *Continental Tyre Group Ltd v Robertson*, unreported, 25 Aug 2010.

4 *Continental Tyre Group Ltd v Robertson*, 2011 GWD 14-321, 2011 WL 1130227.

5 *Continental Tyre* (first instance) at para 15.

6 Para 4.

7 Para 6.

to being misconstrued as a case of defamation, was also rejected.⁸ Having rejected the first three averments on behalf of the defender, Sheriff Kinloch sustained the fourth submission.⁹ On the basis that the crave sought was too general and wide to be enforced, the action failed.

B. THE APPEAL

This decision was appealed, along with a motion to lodge a minute of amendment. Counsel for the pursuer argued that the sheriff had erred, as the original crave was sufficiently narrow and precise.¹⁰ Further, even if this was not the case, counsel noted that it was open to the court to amend a crave in light of the evidence led.¹¹ Dismissing the action was therefore unnecessary. Nevertheless, in the alternative, counsel submitted that the minute of amendment lodged would cure the shortcomings identified at first instance.

The defender opposed amendment and lodged a cross-appeal as to the relevancy of the pursuer's case, arguing that, at best, the sheriff ought to have concluded that the pursuer was required to plead a case on the basis of verbal injury. Further, "there was no link between criticism of the brand of tyres and the distributor of them".¹² The net result, the defender submitted, was that the prevailing defamation test contained in *Sim* – that the words must tend to lower the plaintiff in the estimation of right-thinking members of society generally – could neither be engaged nor satisfied.¹³ Despite entertaining reservations as to whether a court would grant an order in accordance with the amended crave, Sheriff Principal Bowen upheld the appeal and allowed a proof before answer.¹⁴

C. ANALYSIS

The primary issue of concern is the stance taken on the defender's submission that this was a case of verbal injury and not defamation. In response to this submission at first instance, Sheriff Kinloch, having resolved that the case was one of defamation, felt it unnecessary to address the verbal injury question; whilst, on appeal, the Sheriff Principal stated that the main point is to identify that there is an actionable wrong. With respect, the present author rejects these approaches.

The defender's submission that the statement is not enough to constitute defamation seems principled and correct. It was alleged that the defender stated that the barum tyre is unsafe and that he would not put that tyre on his worst enemy's car. At first instance Sheriff Kinloch accepted that this was defamatory because,

⁸ Para 8.

⁹ Para 14.

¹⁰ *Continental Tyre* (on appeal) at para 13.

¹¹ *Webster v Lord Advocate* 1985 SC 173.

¹² *Continental Tyre* (on appeal) at para 18.

¹³ *Sim v Stretch* [1936] 2 All ER 1237 at 1240. The "Sim" test was acknowledged as representing the law of Scotland in *Steele v Scottish Daily Record and Sunday Mail* 1970 SLT 53.

¹⁴ *Continental Tyre* (on appeal) at para 25.

in his view, such a remark is capable of lowering the reputation of the pursuer, a tyre distributor, in the minds of right thinking members of society generally.¹⁵ This test, analogous as it is to that contained within *Sim*, is the correct test to apply.¹⁶ Nevertheless, the present author respectfully disagrees with the learned Sheriff's conclusion on the point.¹⁷ As Norrie observes:¹⁸

... it is unlikely that an allegation concerning a person's property will be defamatory of that person, for it will seldom amount to an attack on a person's character, honour and reputation to state that the property he or she owns is defective in some way.

Nor is it defamatory to state that another distributes property which one believes to be less than desirable or unsafe. Such a comment could cause the former, the distributor, economic loss, but economic loss – or indeed loss of goodwill – does not in itself sustain a claim of defamation. The law allows vehement criticism. Indeed the law allows the dipping of pens (and tongues) in gall where a person is expressing a legitimate criticism.¹⁹ The statement founded upon in *Continental* is a criticism of the product, albeit a criticism in the strongest possible terms. It is not defamatory.

In order for the pursuer's reputation to have been defamed as a result of this statement the pursuer would require either: (i) to be the manufacturer of the tyres or; (ii) for the defender to have stated that the tyres are unsafe, that the pursuer knows them to be unsafe and, in this knowledge, continues to distribute the tyre. This would lower the pursuer's reputation in the minds of right thinking members of society generally because it may reasonably be supposed that a tyre distributor, with due regard to their professional expertise, should only distribute tyres that they believe to be safe. Where a distributor is alleged to have acted contrary to this supposition their reputation would be lowered in the minds of persons generally.

Sheriff Kinloch therefore, in effect, takes a broader view of what may harm the reputation of such a distributor, as he appears to believe it would lower the pursuer in the mind of right thinking members of society to be distributing unsafe tyres, whether knowingly or not. He, in effect, imposes an expectation on distributors to ensure that the tyres they dispense are safe. To do otherwise is to fall short of what

15 It was concluded that "to say that the pursuers are distributing unsafe tyres does... impugn their character or business reputation". See: *Continental Tyres* (first instance) at para 8.

16 On appeal Sheriff Principal Bowen was addressed by counsel for the pursuer on the basis that Walker, founding on *Waddell v Roxburgh* (1894) 21 R 883, provides the test for defamation. A defamatory statement, the pursuer and appellant thus argued, is one which would lead "reasonably, careful, prudent, fair minded and judicious individuals [to] regard such a statement as disparaging" (See D M Walker, *The Law of Delict in Scotland*, 2nd edn (1981) 760). This markedly differs from the most often utilised test of *Sim v Stretch* [1936] 2 All ER 1237 at 1240: "would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?" One would suggest that to lower a person in estimation is to go further than to disparage. For instance, one who is ridiculed is not necessarily lowered in estimation; he is however disparaged. Semantics matter in the framing of the test within this context.

17 *Continental Tyres* (first instance) at para 8.

18 K McK Norrie, *Defamation and Related Actions in Scots Law* (1995) 45.

19 See *Spiller v Joseph and Others* [2010] UKSC 53, [2010] 3 WLR 1791 at para 20 per Lord Phillips (citing *Gardiner v Fairfax* (1942) 42 SR (NSW) 171 at 174).

is expected amongst the public generally. This appears too wide. Context is central in assessing whether a statement is defamatory. Here the pursuer is a distributor and so will neither have the obligation nor capacity to test the tyres which he distributes. Due regard is instead placed upon safety tests. For a distributor to place reliance upon the safety views of others is unobjectionable, and an averment that a specific tyre which they distribute is unsafe will not be defamatory of the pursuer. Such a statement is commercially undesirable from the pursuer's perspective. That is, however, very different from being defamatory.

Although not defamatory, the statements in the present case were potentially actionable. Verbal injury is an actionable wrong "other than" defamation which amounts to an attack on character, honour and reputation.²⁰ In *Continental* verbal injury, specifically slander of property, would have been the appropriate action, as counsel for the defender suggested. In order for there to be slander of property a false malicious statement on the quality of the pursuer's property must have been made and have caused the pursuer loss.²¹ Assuming that the statement is false and that loss resulted, the pursuer in the present case would have but one constituent part of the action to aver and prove – malice.²²

The argument that the present action, properly framed, is one of verbal injury and not defamation was viewed with greater credence on appeal than at first instance.²³ Regrettably, however, Sheriff Principal Bowen did not explore the question in depth, despite observing that it was "not straightforward [as to] whether what is alleged constitutes defamation of the pursuers or is simply to be viewed as an attack on their product".²⁴ The Sheriff Principal instead rejected the submission on the basis that "this distinction may not matter greatly for the purpose of an action for interdict. The question is whether there is an actionable wrong, and if so whether the pursuers are entitled to seek to prevent repetition".²⁵

Potentially there is a wrong, but whether it is actionable depends on whether the constituent elements of the appropriate cause of action are satisfied. How the wrong is framed is therefore central. Where the defender submits that there may be a wrong, but the cause of action lies in the law of verbal injury, not defamation, the judge should decide the point and provide his reasoning. He should not err on the side of continuation by ordering a proof before answer, requiring simply that there be an actionable wrong. This is not a case in which the pursuer has pled defamation *esto* verbal injury. The submission of the pursuer is one of defamation only. It is a legal question whether the words used are capable of bearing the meaning averred, and thus whether the words are capable of amounting to a defamatory statement.²⁶ Without answering this question in the affirmative there cannot truly be a "relevant

20 Norrie, *Defamation* (n 18) 33.

21 Norrie, *Defamation* (n 18) 46-47; Reid, *Confidentiality, Personality and Privacy* (n 2) 105-106.

22 What constitutes malice, and the difficulty of establishing it, are questions for another more substantive paper.

23 At first instance see para 8, and on appeal see para 23.

24 *Continental Tyre* (on appeal) at para 23.

25 *Ibid.*

26 *Russell v Stubbs Ltd* 1913 (HL) 14 at 24 per Lord Shaw.

case which would entitle the pursuers to seek interdict”.²⁷ A proof, or indeed a proof before answer, should only be required where the words are, with due regard to context and “the reasonable, natural or necessary” interpretation of the words, so capable of bearing a defamatory meaning.²⁸ At such a proof the question is whether the words do in fact, with regard to the context and circumstances within which they were made, bare a defamatory meaning as averred. Where the cause of action pled is unsuitable a proof is unnecessary. In circumstances such as those in the present case there is a potential wrong, but it is not actionable as a relevant case of defamation has not been pled. A proof will not change this.

Lord Hunter opined in *Argyllshire Weavers Ltd* that the ingredients of the particular wrong known as slander of property are not well illustrated by decision.²⁹ Lord Hunter, like the present author, attributes this to the fact that the distinction drawn between defamation and verbal injury has not always been maintained.³⁰ To adopt an “actionable wrong” approach, and thereby allow a case to proceed to proof before answer whilst erroneously classified as one of defamation, is to perpetuate this erosion to the benefit of the pursuer.³¹ In short, the distinction between defamation and verbal injury must be reasserted and maintained. It is only where the words would “tend to lower the plaintiff in the estimation of right-thinking members of society generally”³² that an action should be entertained as one of defamation. In making this assessment the judge should examine the words used, apply the test strictly, and place due regard upon the context in which, and to whom, the statement is made. With such an approach – emphasising as it does, the legal question – it will be seen that most statements are not defamatory, but rather verbal injuries. That is not to deny an action: it is merely to recognise that defamation is a niche, not the default action for pursuing injuries to reputation.

D. CONCLUSION

Scotland is a relatively small jurisdiction with limited litigation based upon reputational protection. Much of our current difficulty with the law of verbal injury is due to the fact that the courts have rarely in the last century had an opportunity to articulate and advance relevant jurisprudence. With this in mind, where potential verbal injury cases do arise, the opportunity should be taken to analyse and rationalise authorities, enunciate principles and clarify distinctions between neighbouring actions. These cases should not be disposed of on adjectival grounds at first instance, and allowed to proceed on appeal to proof before answer, without first dealing with substantive points of relevancy which are rightly raised by

²⁷ *Continental Tyre* (on appeal) at para 17.

²⁸ *Russell v Stubbs Ltd* 1913 (HL) 14 at 23 per Lord Shaw.

²⁹ *Argyllshire Weavers Limited and Others v A Macaulay (Tweeds) Limited and Others* 1965 SLT 21 at 35 per Lord Hunter.

³⁰ *Ibid.*

³¹ Intention to injure (“malice”) and falsity are both presumed in the law of defamation; both must be proven in an action for verbal injury.

³² *Sim v Stretch* [1936] 2 All ER 1237 at 1240.

counsel. Dismissal of the argument that this case was one of verbal injury and not defamation at first instance, and the lack of exploration of the point when raised again upon appeal, is therefore disappointing. It is only through rationally distinguishing between causes of action and their respective purposes that the cycle may be broken, verbal injury revived, and coherence amongst authorities subsequently achieved. It is for this reason that the decision in *Continental* represents a missed opportunity.

Ryan T Whelan

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Apparent Authority in Agency: *Gregor Homes Ltd v Emlick*

In a previous volume of this journal,¹ a scheme for apparent or ostensible authority in agency (originally proposed in the *Stair Memorial Encyclopaedia*)² was offered. In the recent case of *Gregor Homes Ltd v Emlick*³ Sheriff Holligan analysed apparent authority, making reference to this proposed scheme. This article analyses the Sheriff's decision. Apparent authority is a central concept in the law of agency, operating to protect third parties from problems caused where an agent acts without sufficient authority. As a general rule, an agent in this position cannot bind his principal in a contract with a third party. Where, however, the principal has acted in such a way as to create the impression of authority, in the context of an action raised by the third party, the principal can be prevented from denying that the agent was properly authorised. If apparent authority is successfully proved, the third party is entitled to damages from the principal to compensate him for the loss of the expected contract.

A. THE FACTS

The dispute centred on missives entered into between the pursuers, a company engaged in the development and sale of houses, and the defender, a businessman. The latter had contracted to purchase plot numbers 5, 8 and 9 Belford Lodge, Sunbury

1 D Busch and L Macgregor, "Apparent authority in agency: some international perspectives" (2007) 11 EdinLR 349.

2 L Macgregor, "Agency and mandate", in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2002) para 76.

3 Edinburgh Sheriff Court, 11 Jan 2011, available at http://www.scotcourts.gov.uk/opinions/A1523_09.html

Street, Edinburgh from the pursuers. The defenders were to carry out works to the property to consolidate the separate plots into one townhouse, and the total price to be paid by the defender for the plots as developed was over £3 million.

At times during the development works, the defender was abroad. In his absence, decisions were made by another individual, Scott Rutherford. Mr Rutherford acted as project manager of the property, and was employed by Belgrave Scotland Limited, a company controlled by the defender.

The missives contained a formula for calculation of the date of entry which made reference to the date of issue of a Certificate of Practical Completion. At a meeting in November 2008, the project manager for the pursuers and Mr Rutherford signed a document agreeing that this could now be issued. Although the date of entry and payment of the price were triggered in terms of the missives, the defender failed to pay the purchase price, indicating that he had no funds to do so. The sale of a property on which he was relying for finance had fallen through. The parties entered into discussions seeking to resolve the dispute, but the proposals made by the defender for payment of a lower price with security for the balance were unacceptable to the pursuers. The property was remarketed by the pursuers, and sold to a Mr Hogg at the lower price of £1.7 million. Mr Hogg subsequently transferred his interest in the property to the defender. The pursuer raised an action for breach of contract, seeking damages to compensate them for the difference between the price agreed under the missives and the price the sellers achieved on the sale to Mr Hogg.

The defender argued that Mr Rutherford had neither actual nor apparent or ostensible authority to agree that practical completion could be issued. Mr Rutherford's actions in this respect were unauthorised, and did not bind the defender. The formula for calculation of the date of entry had not, therefore, been triggered and the defender was not liable to pay the purchase price. The value of the decision lies in the Sheriff's analysis of the principles of actual and apparent authority as applied to Mr Rutherford's actings as an agent.

B. ACTUAL AUTHORITY

The parties were agreed on the meaning of actual authority, Sheriff Holligan confirming:⁴

Such authority may be express or implied and implied authority may arise from a course of dealing between the parties and the circumstances of the case. ... As Diplock LJ said in *Freeman* (at page 502) actual authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are party.

The Sheriff found that Mr Rutherford had actual implied authority, which was sufficient for him to sign a document confirming that practical completion could be issued. This provided an answer to the dispute: Mr Rutherford had been authorised to agree the issue of practical completion, and had bound his principal in this respect. The defender was in breach of the missives and liable in damages to the pursuer.

⁴ Para 35, referring to Lord Diplock's judgment in *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480.

C. APPARENT OR OSTENSIBLE AUTHORITY

(1) A definition and two questions

In case his conclusion on actual authority was erroneous, Sheriff Holligan considered whether Mr Rutherford had apparent authority to bind his principal. The Sheriff quoted Diplock LJ's leading definition:⁵

An "apparent" or "ostensible" authority... is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, *operates as an estoppel* preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

The Sheriff indicated that there were two essential questions for discussion: firstly whether apparent authority is part of the law of agency or is rather part of the law of personal bar; and secondly, what the component parts of the concept are. Clearly these questions are interlinked: potentially, the first can be answered only by answering the second, i.e. by comparing the component parts of both apparent authority and personal bar.

(2) Question one: the nature of apparent authority

The Sheriff noted the extensive influence of English cases on Scots law. Diplock LJ's judgment in *Freeman* has, he noted, been "repeatedly referred to in the authorities and textbooks, both in England and in Scotland"⁶ and was "cited with approval in Scotland"⁷ in *Dornier GmbH v Cannon*⁸ and *British Shoe Company Ltd v Double M Shah Ltd*.⁹ English influence has not, however, been entirely positive. It is not clear in English law whether apparent authority is a form of estoppel or part of the law of agency.¹⁰ In Scots law, although Lord Rodger described apparent authority as "built upon the doctrine known as estoppel in English law and personal bar in Scots law,"¹¹ he was "doing no more than recording the agreed position of the parties".¹² This led the Sheriff to conclude that "it is one thing to say something is *similar* to an estoppel

⁵ Para 41, quoting *Freeman* at 503 per Diplock LJ, emphasis added by Sheriff Holligan.

⁶ Para 39.

⁷ *Ibid*.

⁸ 1991 SC 310.

⁹ 1980 SC 311.

¹⁰ The Sheriff noted this difference of opinion (paras 39-40), citing *Freeman* at 503 per Diplock LJ for the former view and noting also Steyn J's reluctance to enter this debate in *Polish Steamship Co v AJ Williams Fuels (Overseas Sales) Limited ("The Suwalki")* [1989] 1 Lloyd's Rep 511 at 514.

¹¹ *Bank of Scotland v Brunswick (1987) Ltd (No 2)* 1997 SC 226 at 234.

¹² *Gregor Homes* at para 39, citing *Bank of Scotland* at 234 per Lord Rodger.

or bar but it is quite another to say all the varied rules and application of bar apply with equal force to ostensible authority".¹³

By taking this approach, the Sheriff gave himself the freedom to depart from the established criteria of personal bar in framing his definition of apparent authority. Reading between the lines, the Sheriff fears that classifying apparent authority as a type of personal bar would be to apply to the concept restrictive criteria.

The Sheriff's comments made in this context on the application of English precedents are worth quoting:¹⁴

I do not think it is correct, or helpful, to attempt to determine the true content of the law of ostensible authority in Scotland by reference to whatever may be, at any given time, the law of estoppel in England. As has been said estoppel has many variants and a wholly different background to personal bar in Scotland.

(3) Question two: the criteria of apparent authority

In 2002, the current author asked whether apparent authority was a form of personal bar,¹⁵ and suggested that it comprised the following four elements:

- (a) the principal, through representation or conduct;
- (b) induced the third party to believe that the agent was authorised;
- (c) the third party relied on this representation; and
- (d) the third party has suffered loss through this reliance.

Since then, Reid and Blackie have published the first major work on the Scots law of personal bar,¹⁶ and the current author (with Danny Busch) has applied Reid and Blackie's scheme for personal bar to apparent authority in agency.¹⁷ It appears that the Sheriff was not referred to this author's article, and his analysis draws only on the relatively brief comments published in the *Stair Memorial Encyclopaedia* in 2002.

It will be recalled that the Sheriff concluded that apparent authority was part of the law of agency. He nevertheless proceeded with the same exercise carried out by the current author and Busch: that is, analysing apparent authority by reference to Reid and Blackie's scheme. From this work he found support for his view that "personal bar is not an exact replica of estoppel".¹⁸ His final summary of the law is worth quoting in full:

I respectfully endorse the careful analysis of the law of personal bar by the authors in relation to the issue before me. The inconsistent conduct comprises a representation as to the agent's authority, coupled with its later repudiation. In terms of unfairness the authors say "there must be an element of unfairness in the event that the putative principal repudiates the existence of the agency". In the context of agency, unfairness is found in reliance by, and potential prejudice to, the third party. On the topic of prejudice, it is said

¹³ Para 41.

¹⁴ Ibid.

¹⁵ Macgregor (n 2) para 76 ("A form of personal bar?"), noted in *Gregor Homes* at para 37.

¹⁶ E C Reid and J W G Blackie, *Personal Bar* (2006).

¹⁷ Busch and Macgregor (n 1).

¹⁸ Para 43, citing Reid and Blackie, *Personal Bar* (n 16) para 13.14.

that in most cases it is self-evident that the third party would suffer prejudice were the principal to be permitted to deny the agent's authority. Therefore, it is not the prejudice flowing from the representation itself, in any temporal sense, but prejudice flowing from permitting the principal the right to deny the agent's authority.

The Sheriff endorsed the analysis of Lord Rodger in *Bank of Scotland*, describing apparent authority as containing only "... two ingredients, namely a holding out and the transacting by the third party".¹⁹ He noted in particular that this case "does not say there has to be a loss based on reliance",²⁰ an approach shared with *Freeman*. The Sheriff was at pains to avoid the need for a proof of loss and this is, essentially, the reason why he suggests the use of the two-part rather than a possible four-part scheme.

The following quote contains, in essence, the Sheriff's own articulation of apparent authority:²¹

Put in very general terms, the principal does, or permits to be done, something which causes the third party to believe that the agent has authority to act on his behalf. The third party acts in that belief. The third party seeks to exercise his rights relying upon what he and the agent have done. The third party takes action against the principal. The principal seeks to disown the actions of the agent. The law prevents the principal from doing so. To do otherwise would be unfair. The mechanism by which that is done is to say the principal is barred from doing so. Bar acts against the operation of a right which, in this case, is the repudiation of the agent's act.

(4) Application of the law to the facts

Turning once more to the facts of the case, the Sheriff held that there was both a representation to the effect that Mr Rutherford was the defender's agent and that the pursuers relied thereon. Ostensible authority was, in his view, part of the law of agency and contains the two elements of representation and reliance. His application of Reid and Blackie's idea of personal bar led him to the same conclusion: there was both inconsistent conduct and unfairness. Whilst keeping an open mind on whether prejudice to the pursuer was required, he found it to be present in any event where the defender disowned Mr Rutherford's acts. Finally, he accepted the proposition that, once representation and reliance were established, the onus of proof shifted to the defender to establish, on the balance of probabilities, that Mr Rutherford was not authorised by the principal to act as he did. The defender had failed to discharge that onus. This led to the conclusion that Mr Rutherford had bound the defender as his principal by agreeing practical completion and triggered both the date of entry and liability of the defender for payment of the price.

D. CONCLUSIONS

The "chicken and egg" nature of the apparent authority/estoppel debate in English law is visible from the analysis in the leading English text:²²

¹⁹ Para 38, citing Lord Rodger's approach in *Bank of Scotland*.

²⁰ Para 38.

²¹ Para 41.

²² P Watts and F M B Reynolds, *Bowstead & Reynolds on Agency*, 19th edn (2010) para 8-028.

[C]ases on agency and the related notion of apparent ownership which use what would now be called estoppel reasoning can also be traced back many years, and indeed some of them even seem to figure among the origins of the general doctrine of estoppel.

If apparent authority is, as the Sheriff has concluded, part of the law of agency, then what is the nature and rationale of the concept? If apparent authority is an application of personal bar, it must share the same underlying rationale: that is, the prevention of inconsistent conduct. The principal is “at fault” because he has led the third party to believe that the agent was authorised. It follows, therefore, that the principal should be liable to the third party in damages. If apparent authority is not part of personal bar, it need not share this rationale. Merely by classifying it as part of the law of agency, the Sheriff takes us little further in answering this question.

The Sheriff’s approach, although typical in its focus on personal bar, is nevertheless problematic. The significant issue is the principal’s conduct: it is that conduct which triggers the third party’s remedy. Personal bar cannot be the “source” of an action.

The essential difference between the two part scheme (the Sheriff’s preferred option) and the four part scheme is that the former makes no reference to the requirement on the part of the third party to prove loss. The Sheriff noted confusion on this point in English law. Whereas some cases suggest that only an alteration of position is required, others indicate that the third party must act on the faith of the representation.²³ Reid and Blackie suggest that prejudice is, in most cases, “self-evident”.²⁴ They indicate that, once a representation as to authority has been established, the onus shifts to the principal “...to show that the third party had actual or constructive knowledge of any limitation upon it”.²⁵ The authority given for this statement is, however, the leading English text, and, as the Sheriff reminded us, caution should be exercised in the use of English authorities.²⁶ On balance, is “loss” a necessary element of the test? It can potentially be dealt with at the stage of quantification of damages. If the contract which the third party thought he had with the principal would have been a losing one, for example, because the principal was insolvent, the third party would be unlikely to recover any damages. This question requires deeper analysis. It is interesting to note in this context that European legal systems which are not based on estoppel (such as France, Belgium, the Netherlands) do not require proof of loss.²⁷

23 The English case law is summarised by the Sheriff at para 38.

24 Reid and Blackie, *Personal Bar* (n 16) para 13-11.

25 Ibid para 13-10.

26 The authority cited is the leading English text, G S Bower and A Turner, *Estoppel by Representation*, 4th edn by P Feltham, D Hochberg and T Leech, 4th edn (2004) para IX.2.8.

27 See the analysis in D Busch and L Macgregor, “Comparative law evaluation”, in Busch and Macgregor (eds), *The Unauthorised Agent: Perspectives from European and Comparative Law* (2009) 385 at 403. The equivalent rule under the DCFR II-6:104 (“Scope of authority”) provides that where the principal holds out his agent as possessing authority, the unauthorised agent is treated as fully authorised. As a result, the agent has the ability to create an actual contract between principal and third party, notwithstanding his lack of authority. This being the case, the rule is not based on estoppel.

The Sheriff's judgment is notable for its detailed and careful analysis of apparent authority. In this respect it can be contrasted with the majority of Outer House decisions where the difficult issues are side-stepped. This being the case, any criticisms made here are minor ones. The judgment is a significant step towards greater clarity in this difficult area.

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Consumer Redress for Misleading and Aggressive Practices

The Law Commissions have issued a joint consultation on "Consumer Redress for Misleading and Aggressive Practices",¹ which proposes some interesting reforms in the area of consumer redress. The background to the paper is the implementation of the European Union's Unfair Commercial Practices Directive 2005 in May 2008 by the Consumer Protection from Unfair Trading Regulations.² The Directive is designed to ban "unfair commercial practices harming consumers' economic interests".³ "Commercial practices" is widely defined so that the directive and the regulations ban misleading advertising, false claims about products and services, deceptive pricing, high pressure sales techniques, and many other kinds of unfair practices.⁴ Unfairness may occur as a result of a misleading action, misleading omission, an aggressive practice,⁵ or by being one of the thirty one practices set out in Schedule 1. In addition, practices which are contrary to "the requirements of professional diligence" are also banned.⁶ This is designed to be a catch-all category to ensure that the regulations are future-proof.⁷ With the exception of the Schedule 1 practices, it must be shown that the practice would cause an "average consumer"

1 Law Commission and Scottish Law Commission, *Consumer Redress for Misleading and Aggressive Practices: A Joint Consultation Paper* (Law Com CP No 199 and Scot Law Com DP No 149, 2011).

This project was formerly referred to as Misrepresentations and Unfair Commercial Practices and this title has inadvertently appeared on the front cover of the printed discussion paper.

2 SI 2008/1277, implementing Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, OJ 2005 L149/22.

3 Directive art 1. The UK regulations follow closely the wording of the Directive.

4 Directive art 2(d).

5 Art 5(4).

6 Art 5(2).

7 See G B Abbamonte, "The Unfair Commercial Practices Directive and its general prohibition", in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (2007) 11 at 20-21.

to take a different “transactional decision” or, in the case of the catch-all provision, that it would “materially distort... the economic behaviour” of this hypothetical person.⁸

The regulations are enforced by empowering Trading Standards Departments and the Office of Fair Trading to bring criminal proceedings against rogue traders and to obtain enforcement orders under Part 8 of the Enterprise Act 2002.⁹ What the regulations do not provide is a private right of redress for their breach. It is, of course, possible for victims of unfair practices to invoke existing contractual, delictual or restitutionary remedies, as the Directive makes plain that it is “without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract”.¹⁰ Following pressure from consumer organisations, the Law Commissions were invited to provide the Department of Business, Enterprise and Regulatory Reform (now the Department of Business, Innovation and Skills (BIS)) with preliminary advice on this issue¹¹ and in February 2010 BIS asked them to advise on the simplification of the law on misrepresentation, the clarification of the law on duress and the introduction of a private right of redress for victims of unfair commercial practices. In April the Commissions published their joint consultation paper.

A. THE CONSULTATION PAPER

The consultation paper acknowledges the scale of the problem of unfair trading: according to research by Consumer Focus almost two-thirds of the population has been the target of a scam within the last two years. Those who were victims lost on average £175 though losses ranged from £50 to £800 with, occasionally, much higher sums being involved. The annual cost of consumer detriment in Great Britain arising solely from unfair commercial practices was estimated to be £3.3 billion.¹² As the consultation paper points out, rogue traders use a variety of practices to mislead and pressure consumers. Existing private remedies might be used to recover such losses. However, as the consultation paper points out, these remedies have been developed in the context of commercial transactions between businesses and often are ill-adapted to modern consumer circumstances. Where misleading statements have been made the law of misrepresentation might in theory provide redress but it

⁸ SI 2008/1277 reg 3(3)(b).

⁹ The regulations have been considered in *Office of Fair Trading v Purely Creative Ltd* [2011] EWHC 106.

¹⁰ Directive art 3.2.

¹¹ Law Commission, *A Private Right of Redress for Unfair Commercial Practices?* Preliminary Advice to the Department for Business, Enterprise and Regulatory Reform on the Issues Raised (2008).

¹² Consumer Focus, *Waiting to be Heard: Giving Consumers the Right of Redress over Unfair Commercial Practices* (2009). In 2008 the Office of Fair Trading put the figure at £6.6 billion using a different definition of consumer detriment: see Comptroller and Auditor General, *Protecting Consumers – The System for Enforcing Consumer Law* (HC 2010-12, 1087) para 1.3.

“presents a confusing patchwork of doctrines, based on case law which is inaccessible to consumers and non-legal advisers”.¹³ The Commissions identified seven causes of action showing that the problem “is not shortage of law but a superabundance”.¹⁴ In the case of aggressive practices, the Commissions consider that there are “serious gaps in the law” and that existing causes of action (duress, undue influence and harassment) do not address the specific problems experienced by consumers”.¹⁵

It is not surprising that the Commissions conclude that there is a need for legislation to give a private right of redress. What they propose is “a limited and cautious reform”¹⁶ applying only to misleading actions and aggressive practices where consumers have entered into contracts with traders or made a payment to them. The latter point is designed to cover situations such as unjustified demands relating to parking or “civil recovery” against alleged shoplifters. Land transactions (not including lettings) and financial services will not be covered as the remedies proposed might not be appropriate to the high value losses that can arise on the sale of land and, in the case of financial services, because of the existing regime under the Financial Services and Markets Act 2000. Misleading omissions would not be covered nor would the thirty one specific practices in the Schedule. The exclusion of misleading omissions is justified on the ground that it would introduce a general duty of disclosure and that this would introduce uncertainty and encourage vexatious claims. There is some force in these arguments though, given the impediments to litigation, one wonders how realistic fear of an increase is. However, the limitation is ameliorated by the fact that what might be seen as an omission can also be presented as a positive misrepresentation. The exclusion of the Schedule 1 practices will not matter a great deal as many are specific examples of misleading or aggressive practices. It is not proposed to extend the remedies to breach of the catch-all practices contrary to the “requirements of professional diligence”. Here again, it is unlikely that many practices would fall solely into this category.

Where a consumer can establish the liability of the trader the Commissions propose a two tier system of remedies, designed to be clear and simple. This is justified on the basis that frequently fairly small sums of money will be in issue and advice will often be sought from advisers who are not legally qualified. The Tier 1 remedy, available in all cases, consists of a right to “unwind the contract”, a phrase deliberately chosen to be more readily comprehensible than the technical terms “rescission” and “reduction”. Under this remedy, where consumers act within three months they would receive a refund of money paid and not be required to meet any future obligations. While this would be adequate in many situations such as bogus prize draw scams or the unjustified payments just referred to, there will be situations where it is not appropriate because it is no longer possible to unwind the transaction or the consumer has not acted within three months. Here the consumer will be entitled to a discount on the purchase price and, to simplify its calculation,

13 Law Commissions, *Consumer Redress* (n 1) para 5.98.

14 Para 10.2.

15 Para 10.3.

16 Para 12.3.

the Commissions suggest four bands from 0% to 100% depending on factors such as the impact on the value of the product, the trader's behaviour and time between the commercial practice and the consumer's complaint.

B. ANALYSIS

It will be objected that the Tier 1 remedies by themselves are a little too rough and remedy and would leave some victims inadequately compensated. To meet this criticism Tier 2 remedies are available. These would be available in addition to Tier 1 remedies but would be likely to be used only in serious cases where the misleading or aggressive practice caused actual loss beyond the Tier 1 amounts. They would cover economic loss suffered because of a practice and distress or inconvenience. A package holiday which did not live up to the claims in the brochure might well be a case where the Tier 2 remedies would come into play. Consumers misled by inaccurate statements into booking a holiday will usually have little option but to make the best of the situation they find themselves in when they reach their destination. Unwinding the transaction is unlikely to be practicable, and their claims will be for economic loss and disappointment.

However, such remedies are subject to a due diligence defence of the sort familiar in consumer legislation creating criminal offences. Where traders can show that they acted with due diligence they will not be liable for these indirect losses. This seems a curious idea more relevant to the creation of liability in the first place than the calculation of damages. The consumer has still suffered loss and whether that has been because of an innocent, careless or even fraudulent error matters not. It seems strange that of two innocent parties it should be the consumer who must bear the loss.

It is envisaged that the proposed reforms will be effected by a new Act replacing in relation to business to consumer transactions section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 and, in relation to England and Wales, the Misrepresentation Act 1967. The reforms are welcome and much needed. However, their efficacy needs to be set in the context of the wider problems of civil redress. Existing procedures are not much resorted to by consumers and the Impact Assessment annexed to the consultation paper does not suggest that the new remedy will do much to alter this.¹⁷ It is pointed out that a simple remedy may encourage criminal courts to make more compensation orders.¹⁸ The trouble with this argument is that there is a well known reluctance amongst prosecuting authorities, especially in Scotland, to bring prosecutions relating to consumer offences and even if that does happen there is no mechanism for ensuring that the victim can intervene to request

¹⁷ The Impact Assessment at para 1.107 speculates that there might be 100-500 small claims each year as a result of the proposed reforms. It is available online at http://www.justice.gov.uk/lawcommission/docs/cp199_consumer_redress_impact_assessment.pdf.

¹⁸ Law Commissions, *Consumer Redress* (n 1) para 14.8

that an order be made.¹⁹ Given that many of these claims will result from breaches of the regulations affecting numerous consumers incurring small losses what is needed is a multi-party action procedure in the Scottish legal system as recommended by the Scottish Law Commission²⁰ and endorsed by the Scottish Civil Courts Review.²¹

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Positive Prescription of Corporeal Moveables?

The Scottish Law Commission has revisited the question of the positive prescription of moveable property¹ some thirty-five years after its 1976 Consultative Memorandum² concerned with the same issue. Earlier, the Commission report³ which led to the Prescription and Limitation (Scotland) Act 1973 had ruled out proposals concerning positive prescription of moveables “until we had considered problems of title to corporeal moveables more generally”. No final report followed the 1976 paper, and there has been no judicial development or clarification of the common law. At the academic level, however, a convincing case has been made to confirm the view that the common law sources do not provide for positive prescription applying to corporeal moveables.⁴

In its Discussion Paper, the Commission points out that the absence of law on positive prescription of moveables leaves a gap. At the same time, it is acknowledged that provision on this is much less important applied to corporeal moveable property than to land – this, of course, being true even post registration of title. Also, as the discussion paper acknowledges, the subject under consideration does not rate in importance compared to that matter of everyday incidence, the negative prescription of obligations.

19 In 2009/10 only 173 prosecutions under the regulations were brought in the whole of the UK: Office of Fair Trading, *Positive Influence: Annual Report and Resource Accounts 2009-10* (2010) annex G, table G-7.

20 Scottish Law Commission, Report on *Multi-Party Actions* (Scot Law Com No 154, 1996).

21 *Report of the Scottish Civil Courts Review* (2009) vol 2 para 13.64.

1 Scottish Law Commission, Discussion Paper on *Prescription and Title to Moveable Property* (Scot Law Com No 144, 2010).

2 Scottish Law Commission, Consultative Memorandum on *Corporeal Moveables: Usucapion or Acquisitive Prescription* (Scot Law Com CM No 30, 1976).

3 Scottish Law Commission, Report on *Reform of the Law Relating to Prescription and Limitation of Actions* (Scot Law Com No 15, 1970) para 3.

4 A R C Simpson, “Positive prescription of moveables in Scots law” (2009) 13 EdinLR 445.

A. THE CURRENT LAW

As the law stands, the only prescription applicable to corporeal moveables is the negative form provided for in section 8 of the Prescription and Limitation (Scotland) Act 1973. This provides that a right relating to property, heritable or moveable, which has subsisted for a continuous period of twenty years unexercised or unenforced, and without any relevant claim having been made, is extinguished on expiration of the period. An important limitation is that the right to recover stolen property from the thief or “any person privy to the stealing” is imprescriptible.⁵

An unresolved issue concerns the consequence of section 8 operating to bar the owner’s right to recover. The Commission’s answer is “that the common law gives ownership to the Crown”, that owned property “cannot cease to be owned” and that “[i]f no one else owns... the Crown does: *quod nullius est fit domini Regis*.”⁶ The implication is that the possessor who successfully invokes negative prescription under section 8 immediately becomes vulnerable to the Crown. But how can this be reconciled with the presumption that the possessor of a moveable is its owner? The SLC acknowledges that “[t]he fact of possession raises a presumption of ownership”⁷ but, of course, that does not detract from the fundamental point that ownership and possession are distinct and the former may trump the latter. That the SLC take this to be the position appears from the final list of “proposals and questions”; on the question whether “the ownership of corporeal moveable property should, like land, cease to be subject to negative prescription” it is stated that “[a]t present, the sole beneficiary of negative prescription of title to moveables is the Crown”.⁸ Perhaps this important issue of the scope of the *quod nullius* doctrine can be explored by example.

In 1988 P bought from a reputable Edinburgh antique dealer a pair of 17th century French chairs. In 2011 D, claiming that the chairs were stolen from him, seeks to recover them. In principle D can rebut the presumption protecting P’s possession by proving his title and showing – by reference to the theft – that he did not part with possession in circumstances consistent with a transfer of ownership. But, because more than twenty years have passed since D’s loss of possession, P can rely on section 8 of the 1973 Act unless D can show that he (P) was privy to the theft. If P’s purchase is found to have been in good faith decree will be against D with the consequence that P will be entitled to continue in possession.

The Commission envisage a possible scenario in which the Crown now asserts a title to the chairs. Acknowledging that “in practice the Crown would not assert its right” the view is nonetheless taken that “it is better if the law can give a sensible result, rather than giving an unsensible result with the hope that people will sensibly ignore that result”.⁹ But is the Commission correct in the view that in theory the Crown could claim a thing from the possessor upon the true owner’s right

5 Prescription and Limitation (Scotland) Act 1973 Sch 3 para (g).

6 Scottish Law Commission, *Prescription and Title to Moveable Property* (n 1) para 2.6

7 Para 2.1.

8 Part 12, s 17.

9 Para 2.7.

to recover being extinguished by negative prescription?⁹ An alternative view is that the Crown would not be able to rebut the presumption—which continues to protect the possessor—because while it could establish title it would not be able to show that it lost possession in circumstances inconsistent with transfer—for the obvious reason that it never had possession. If a claim by the Crown is denied on the basis contended for it seems that negative prescription functions with the presumption that the possessor is owner to give a result equivalent to one which would be achieved by positive prescription.

B. COMPARATIVE LAW

A comparative survey in part 5 of the Discussion Paper demonstrates the considerable variation in the period of possession required by different systems—three years in France, thirty in South Africa being the apparent outer limits. But prescriptive period is not the full story in all systems because some protect the *bona fide* purchase of a moveable to the extent that the circumstances of an apparently legitimate market transaction may give an unimpeachable title.

This feature of Italian law was strikingly illustrated in the English *Winkworth* decision.¹⁰ In this case an owner's right to recover stolen artworks—removed from England; sold to a *bona fide* buyer in Italy; returned to England for auction—was denied because, on the basis of the *lex situs* rule of private international law, Italian law giving title to a *bona fide* purchaser was held to apply. The rationalisation that commercial policy should allow acquisition of goods purchased by an honest party in normal market circumstances may be associated with the inarticulate thinking of the maxim *mobilia non habent sequelam* and the more specific defence of market overt. Scots law, of course, has never subscribed to a market overt exception to the prerequisite that the seller has a good title to transfer. Section 22(2) of the Sale of Goods Act 1979 exempted Scotland from the section 22(1) provision recognising market overt but the latter was repealed in 1994 after its use to launder the defective title to Gainsborough and Reynolds paintings stolen from Lincoln's Inn.¹¹ The common law *vitium reale* goes far in Scots law to protect an owner against possible loss of title following theft—the presumption that the possessor is owner is open to rebuttal by an owner deprived by theft. The owner's right to recover is only lost by negative prescription after twenty years and only against a party innocent as to the theft.

C. CULTURAL OBJECTS AND TREASURE

Possibly the most important area of potential application of a rule providing for the positive prescription of corporeal moveables is in relation to “cultural objects”, specially considered in part 4 of the Discussion Paper. In the most usual forms of consumer corporeal moveable property the significance of possible title issues decline

¹⁰ [1980] Ch 496.

¹¹ See F M B Reynolds “Abolition of market overt” (1995) 111 LQR 76.

as a matter of direct correlation to depreciation. Recognition of this is one justification for the good faith purchase position of some systems. But this approach is hard to justify in respect of the loss of an appreciating thing, typically a work of art or object of cultural property. A powerful international trend to recognise and protect inherent rights, whether associated with title lost through wrongful dispossession or objects associated with cultural identity removed from their native environment, has produced a significant growth of international and domestic legal regulation. As the Discussion Paper observes, “cultural property law”, with criminal and export control implications, is a much wider subject than the positive prescription of moveables in Scottish private law issue.¹² Nonetheless, the question remains as to whether reform should make separate provision for “cultural objects”, however defined. The DCFR does this in its provision for acquisitive prescription; in respect of property defined in the EU Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State¹³ the DCFR would apply extended periods of thirty and fifty years depending upon whether the possession was in good faith or not.¹⁴

The prevailing common law position of Scots law vests a find of “treasure” or an object of archaeological or historical importance in the Crown on the basis of the all encompassing *quod nullius* rule, already referred to, in terms of which all forms of previously owned property which come to be unowned belong to the Crown. The practical benefits of this rule are that lost things can be restored to their rightful owner and unowned treasures or antiquities can be applied to the public benefit, including museum display. It may be inconvenient for public authority to have to deal with the vast range of useless and unwanted things which consumer society leaves in its wake but this would, in any event, be the ultimate responsibility of state authority.

Specifically regarding treasure or antiquities, the distinctive *quod nullius* rule serves the important purpose of securing for the nation things which should neither be open to individual acquisition by finding nor susceptible to ready positive prescription. The question “[s]hould corporeal property that is abandoned become ownerless, and thus susceptible to appropriation under the doctrine of *occupatio*”¹⁵ should be rejected for tending towards “finders keepers” thinking – foreign to Scots law – which puts individual entitlement above that of society as a whole.¹⁶ In the situation of retention by a finder two points of present law are relevant. The Crown as title holder can readily rebut the presumption protecting possession because its right to possession was denied by the taking finder – such circumstances obviously being inconsistent with transfer. Also, negative prescription will only bar a claim by the Crown in favour of one innocent as to the object’s provenance.

12 Scottish Law Commission, *Prescription and Title to Moveable Property* (n 1) para 4.3.

13 Council Directive 93/7/EEC of 15 Mar 1993, OJ 1993 L 74/74, art 1(1).

14 DCFR VIII-4:102.

15 Scottish Law Commission, *Prescription and Title to Moveable Property* (n 1) para 9.7 and Part 12, s 21.

16 A recent case in point, reported in *The Times*, 8 Jun 2011, is the pre-Ice Age axehead found by a man walking on the beach at St Ola, Orkney.

D. CONCLUSION

On the central issue of the case for positive prescription, the Discussion Paper refers to four arguments:¹⁷ the fairness of long possession giving protection against dispossession; the certainty deriving from an acknowledgement that possession has given rise to title; the fact that the positive prescription of moveables is recognised in most legal systems; and the argument that positive prescription protects sellers as well as buyers because it functions to indemnify the former against defective title claims by the latter. The paper's general conclusion is that "there should be positive (acquisitive) prescription for corporeal moveable property" because "if right and possession are separated... for that separation to exist without limit of time is unacceptable".¹⁸ The Commission's view is that "the period should be at least fifteen years".¹⁹

This note can only touch on a few aspects of a most thorough and well presented discussion paper. On a utilitarian basis one might question the case for a law reform project regarding an area of provision which, while possibly idiosyncratic, is essentially unproblematic and, moreover, appears to serve the important area of cultural property rather well. But, from the point of view of enhanced dogmatic integrity, the discussion paper is a welcome step. In admirably covering the ground preliminary to possible reforming legislation the paper undoubtedly advances appreciation of the workings of an area of private law dominated by historical evolution rather than policy. Taken with the relevant part of the important DCFR work published in 2010 – much referred to in the Discussion Paper – we have a valuable body of analysis and evaluation on all aspects of the positive prescription of moveables question. An ancillary benefit is that this combination of research work takes forward the contribution of the 1976 discussion paper in a valuable way for teaching purposes.

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(The author is grateful to Andrew Simpson for comments on a draft of this note.)

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The Importance of the New JP Court

A. A QUESTION

Lay courts in Scotland – originally Burgh, Police and JP Courts, but combined into District Courts in the 1970s – have been Cinderellas of the legal system, and seen as being of little interest. This is understandable, for their nature was always disparate

¹⁷ Scottish Law Commission, *Prescription and Title to Moveable Property* (n 1) para 6.10.

¹⁸ Para 6.19.

¹⁹ Para 7.14.

(being administered by local authorities), and their jurisdiction limited to minor crime (at least in modern times).

But their status changed recently. The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 transformed District Courts into the new JP Courts as part of “summary justice reform” following the McInnes Report.¹ Thus, the lay courts have been incorporated into a unified hierarchy of courts, and selection and training of lay justices improved. These reforms sought greater community involvement in the administration of justice, but also intended that the space created by greater use of alternatives to prosecution allow lay courts take more serious cases, cascading down from sheriff summary courts (and so on, up the hierarchy). So how important are they now?

B. QUANTITY

One measure of importance is the proportion of criminal proceedings they take, clearly significant in itself, but also interesting as the McInnes Committee majority view was that District Courts should be abolished, in part, because they were in decline.²

McInnes, using the standard criterion of “Persons proceeded against in court”, concluded that lay District Court “business [had] approximately halved”³ over the preceding decade.⁴ Only raw numbers were given, but these indicated a decline which can be calculated as from 43% of “persons proceeded against in court” in 1992 to 27% in 2002 (in fact nearer one third than one half).⁵ This decline was “largely as a result of the expansion of alternatives to prosecution” such as fiscal fines,⁶ but also because total recorded crime decreased by 25% from 1991 to 2002.⁷

So has the decline continued since McInnes, a decade in which “summary justice reform” introduced numerous changes, including enhancement of “alternatives to prosecution”, as well as replacement of District Courts by JP Courts? The answer is difficult to pin down. The standard source, the Scottish Government’s annual Statistical Bulletin “Criminal Proceedings in Scottish Courts”,⁸ gives a figure for

1 Summary Justice Review Committee, *Report to Ministers* (2004), available at <http://www.scotland.gov.uk/Publications/2004/03/19042/34176>.

2 Para 7.72(i). The 2007 Act reflected the Executive’s preference for the minority view.

3 That is: from 84,705 out of 198,038 cases to an estimated 37,000 out of 138,000. Stipendiary magistrates’ business had dropped from about 6% to about 4.5%.

4 Summary Justice Review Committee, *Report* (n 1) para 4.27 and table in para 4.28 (sourced from the unpublished Scottish Executive Justice Department court proceedings database).

5 D Oag, G Ross and F McCallum, *The Scottish Criminal Justice System: The Criminal Courts* (SPICe Subject Map, Devolved Area 01/08, 2003) 4, recording that in 2001, of persons proceeded against, 29% were before District Courts (excluding a further 4% before stipendiary magistrates).

6 Summary Justice Review Committee, *Report* (n 1) paras 4.27 and 7.19.

7 Ibid para 7.19.

8 The most recent is Scottish Government, *Criminal Proceedings in Scottish Courts 2009-10* (2011), available at <http://www.scotland.gov.uk/Resource/Doc/338582/0111403.pdf>.

“Persons proceeded against in court”,⁹ but it is not broken down by type of court. A surrogate, “Persons with a charge proved” is, however,¹⁰ and indicates that the proportion of case taken by District/JP Courts did not decline over this period, but bumped along on a plateau at 36-37% for most of it,¹¹ suddenly increasing in 2009-10 to 42% (a rise of over 10% in a year).

This gives distinctly higher proportions than the McInnes Report found for the whole decade that it considered.¹² Moreover, the raw numbers given are higher,¹³ which is clearly odd, because the number of “Persons with a charge proved” cannot be higher than “Persons proceeded against in court”. However, with different sets of figures, produced by different people, for different purposes and by different means,¹⁴ differences might be expected. (To exemplify, McInnes disaggregated Stipendiary Magistrates’ figures from District Courts figures, while the Statistical Bulletin aggregates them).¹⁵ So corroboration of the post-McInnes pattern which the Statistical Bulletin reveals would be welcome.

Such corroboration is provided by Crown Office and Procurator Fiscal Service “Case Processing—the last five years” data.¹⁶ This records cases “processed” by Crown Office, so the figures are not directly comparable with either McInnes’ or the Statistical Bulletin’s. (Also, the raw numbers are lower than the Statistical Bulletin’s, possibly because stipendiary magistrates’ are aggregated with sheriff summary courts).¹⁷ Nevertheless, for the five years covered, they confirm the Statistical Bulletin pattern of a plateau, though calculated (as only raw numbers are given)¹⁸ at between 31% and 33%, ending with a rise in 2009-10, calculated at 36%¹⁹ (a rise of about 10%). Thus, although the precise level is unclear, the pattern seems likely to reflect reality. The decline that McInnes predicted has not occurred.

This is presumably because of the interaction of two Crown Office policies in the light of the various aspects of “summary justice reform”: that is, the use of

9 Ibid table 1, final row. See also table 2.

10 Ibid table 3 (for definitions of “person... proceeded against or convicted” and “person with a charge proved”, see annex C para C1(a)).

11 But 34% in 2003-2004.

12 e.g. Scottish Government, *Criminal Proceedings 2009-10* (n 8) table 3 gives 38% for 2001-02, whereas Summary Justice Review Committee, *Report* (n 1) paras 4.27-4.28 gives a number calculated above at 27% for 2002 (see text accompanying n 5). For *Statistical Bulletin* figures for the whole McInnes decade, see Scottish Government, *Criminal Proceedings in Scottish Courts, 2002* (CrJ/2004/1, 2004) table 2, which shows much smaller decline than the McInnes report. (Note that para 23 corrects figures published in 2001 which included 1992, and were somewhat closer to the McInnes report.)

13 43,939 for 2001-02, compared with McInnes’ estimated 37,000 for 2002.

14 See Scottish Government, *Criminal Proceedings 2009-10* (n 8) annexes A-D, especially annex A para A1.

15 See Scottish Government, *Criminal Proceedings 2009-10* (n 8) table 3 n 5.

16 Available at <http://www.crownoffice.gov.uk/About/corporate-info/Caseproclast5>.

17 Ibid n 4.

18 Between 38,973 “total District Court disposals” out of 296,874 “total court disposals” in 2006-2007, and 40,746 out of 123,919 in 2005-2006 (and similarly in 2008-2009).

19 42,196 “total District Court disposals” out of 116,047 “total court disposals” in 2009-2010.

“alternatives to prosecution”, and on which court to prosecute in. On the former, there is published information, for instance, in both Statistical Bulletin²⁰ and “Case processing” data,²¹ recording differences in the use of warnings, “fixed penalty” notices, “fiscal fines” and so on over the last few years. These present a complicated picture impossible to further examine here, though (as McInnes noted)²² increased use of “direct measures” obviously tends to reduce the JP Court proportion of cases, by taking minor cases away from the courts entirely.²³ On the latter, there is little or no published information. However, it can be inferred to have increased the proportion by broadly the same amount, by diverting cases otherwise taken by sheriff summary courts.

Though only a bold person would predict future proportions, it seems clear that at present, JP Courts take about a third of all criminal proceedings in courts, and this proportion may be rising.

Incidentally, since solemn procedure takes only 4% of all cases,²⁴ and some of those are disposed of by pleas of guilty,²⁵ this third is much higher than the proportion of all cases in which a jury is in fact involved. *Ceteris paribus*, the chances of a person charged with an offence actually being brought before a lay court approach ten times those of actually being brought before a jury.

C. QUALITY

This introduces another principal measure of importance, i.e. the seriousness of the crime they take. This is again significant in itself, but also in the light of the fact that JP Courts were expected to take more serious cases.

Clearly, the crime is all minor, but, without wishing to minimise its importance, most crime is relatively minor. The Statistical Bulletin includes a table of “Persons with a charge proved by main crime/offence”. This shows that, in 2009-10, there were 2,453 convictions for the most frequent types of major crime, i.e. “Non-sexual crimes of violence”,²⁶ including all types of homicide (115);²⁷ serious assault and attempted murder (1,501); robbery (533); and others, including threats, extortion and cruel and

²⁰ Scottish Government, *Criminal Proceedings 2009-10* (n 8) tables 21-29.

²¹ “Non-Court Disposals”.

²² Summary Justice Review Committee, *Report* (n 1) para 7.19 (also paras 7.42-7.47 and 7.72(i)).

²³ Non-court disposals now exceed court disposals: see R M White, “Out of court and out of sight: how often are ‘alternatives to prosecution’ used?” (2008) 12 EdinLR 481.

²⁴ Scottish Government, *Criminal Proceedings 2009-10* (n 8) table 3 shows that 1% of “persons with a charge proved” appeared before the High Court, and 3% before sheriff solemn courts.

²⁵ Proportions of guilty pleas are not recorded, but Scottish Government, *Criminal Proceedings 2009-10* (n 8) table 2 gives frequencies of desertions and acquittals by type of case, suggesting the percentage of cases proved decreases with seriousness.

²⁶ Ibid table 4(a).

²⁷ Annex D.

unnatural treatment of children (304).²⁸ But examination of some relatively minor crimes shows that the number of convictions for acts of vandalism (3,629) was one and a half times greater than all the “Non-sexual crimes of violence” put together; the number for shoplifting (8,076) was some three times greater; and the numbers for breach of the peace (14,051), “petty or minor assault” (14,107) and speeding (14,375) were each nearly six times greater.²⁹ Relatively minor crime is much more common than major crime.

This conclusion is reinforced by penalty data. The Statistical Bulletin records that 87% of all court disposals were non-custodial in 2009-10, a proportion steady for at least a decade.³⁰ Indeed, at 13%, the proportion of custodial sentences in 2009-10 was the same as the proportions of each of probation orders, and of cautions or admonitions in that year, both of which rose steadily over the preceding decade, from 10% to 13% (a rise of about a third), and from 11% to 14% (a rise of similar magnitude), respectively.³¹ Courts admonish as often as they imprison.

Fines are, of course, the most common penalty. These amounted to 59% of all disposals in 2009-10, a decline over the preceding decade from 65%³² (thus balancing out the increased proportions of probation and admonition, though the Statistical Bulletin attributed the decline, in part, to increased use of non-court disposals).³³ More surprisingly, the level of fines does not appear in general to be high, for the average imposed on individuals (as opposed to companies) by all courts was £217 in 2009-10.³⁴ This is less than a tenth of the £2,500 maximum fine the JP Court can currently impose.³⁵

Unfortunately, however, the Statistical Bulletin does not break disposal figures down by court, so it is impossible to tell what proportion of custodial sentences, what level of fines, etc, were imposed by JP Courts. In any case, these proportions will doubtless change in the future, given increased use of non-court disposals,³⁶ reform of “community penalties”³⁷ and restrictions upon short sentences³⁸ (which all also assume that most crime is relatively minor), and possible increases in JP Court sentencing powers.³⁹

²⁸ Annex D.

²⁹ Table 4(a).

³⁰ Table 7, second table.

³¹ *Ibid.*

³² *Ibid.*

³³ Para 5.5.14.

³⁴ Para 5.5.16.

³⁵ Criminal Procedure (Scotland) Act 1995 s 7(6)(b) and (7)(b) read with s 225(2). (The maximum sentence of imprisonment is 60 days: s 7(6)(a) and (7)(a)).

³⁶ ss 302, 302A, 302B, 302C, 302ZA and 302ZB. For discussion, see R M White, “The Summary Criminal Proceedings (Abolition) (Scotland) Act 2007?” 2008 JR 215.

³⁷ Criminal Procedure (Scotland) Act 1995 ss 227A-227ZN.

³⁸ s 204(3A).

³⁹ Criminal Proceedings etc. (Reform) (Scotland) Act 2007 s 46 (not yet in force) allows increases to fine and imprisonment maxima to be made, within certain limits, by statutory instrument.

D. CONCLUSION

Evidence of quantity and quality of cases in the new JP Courts indicate that they take about a third of all criminal proceedings, a proportion which may be rising, and is not an insignificant appendix to “real crime”, but the typical stuff of the criminal courts. They are important and may be increasingly so.

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